PUBLIC VERSION – CONFIDENTIAL MATERIAL REDACTED

231685

BEFORE THE
SURFACE TRANSPORTATION BOARD

CF INDUSTRIES, INC. Complainant, v. INDIANA & OHIO RAILWAY COMPANY, POINT COMFORT AND NORTHERN RAILWAY COMPANY, AND MICHIGAN SHORE RAILROAD, INC. Defendants.	Docket No. FD 35517

OPENING EVIDENCE OF THE DOW CHEMICAL COMPANY

The Dow Chemical Company ("Dow") hereby submits its Opening Evidence in the above-captioned proceeding pursuant to the procedural schedule issued by the Surface Transportation Board ("Board") on September 30, 2011. As described below, the challenged special train service or priority train service proposal[1] ("PTS proposal") established by Defendants is an unreasonable practice in violation of 49 USC § 10702 and cause Defendants to violate their common carrier obligation under 49 USC § 11101.

I. Summary of Argument.

The PTS proposal was designed by a small group of railroad executives with apparently no expertise in tank car design, derailments, or tank car ruptures. It was designed without any empirical studies or testing of any kind, and without the assistance of experts or outside

[1] Defendants have repeatedly taken issue with the terminology used by Complainants to described the challenged provisions. See, e.g., Defendants' Motion to Dismiss at p. 4 (filed May 5, 2011); Defendants' Response to Complainants' Supplemental Information at p. 5-6 (filed Oct. 31, 2011). Defendants have also claimed that they can moot this entire proceeding simply by renumbering the challenged tariff while making slight modifications. See Defendants' Motion to Dismiss at p. 4 (filed May 5, 2011). The Board has not been, and should not be, distracted by this obfuscation.

consultants. The Board should reject Defendants' *ad hoc* attempt to superimpose requirements in an area already comprehensively regulated by several federal agencies that have spent decades of painstaking analysis and scientific studies, with voluminous public comment, to develop the current regulatory regime. There is no evidence that the challenged PTS proposal increases safety in any way. In short, it is an arbitrary, wasteful provision[2], and the Board should find the PTS proposal to be an unreasonable practice that results in a violation of the common carrier obligation.

II. Identity and interest of Dow.

A. Identity of Dow.

Dow is a diversified chemical company that harnesses the power of science and technology to constantly improve what is essential to human progress. Dow offers a broad range of innovative products and services to customers in more than 175 countries, helping them to provide everything from fresh water, food, and pharmaceuticals to paints, packaging, and personal care products. In order to provide many of these essential products and services, Dow both produces and uses hazardous materials, including materials that are classified as toxic inhalation hazards or poison inhalation hazards ("TIH/PIH" materials). The broad range of products that Dow produces span virtually every industry, including railroads, and make possible approximately 90% of the goods people use every day.

Dow has developed a culture of safety and responsibility that pervades all of its activities. This culture has generated a long track record of innovation and investment to improve Dow's safety performance in the production, use, and transportation of hazardous materials. Dow recognizes the risks inherent in transporting hazardous materials and is continually designing and re-designing its supply chain to minimize those risks. This includes efforts to reduce or

[2] Atchison Railway Company v. United States, 232 U.S. 199, 217 (1914).

eliminate the shipment of highly hazardous materials, continually optimize sourcing and routing of those materials, improve shipping containers, monitor their location and condition in transit, and enable effective emergency preparedness and response. Currently, 20 percent of Dow's 2.2 million product shipments annually are regulated as hazardous materials or dangerous goods. Dow's collaborative efforts with carriers across all transportation modes have achieved an incident-free rate of 99.97 percent and earned it award recognition in the last few years from Norfolk Southern Railway, CSXT, BNSF, Kansas City Southern Railway, Canadian Pacific Railway ("CP"), and Canadian National Railway ("CN") for leadership and performance in safety practices. For its efforts and performance in 2011, Dow expects to receive safety awards from CN, CP, CSXT, and the Union Pacific Railroad.

Dow's major manufacturing sites in the United States are located in Texas, Louisiana, Michigan, California, and West Virginia. These sites, and others around the country, are dependent upon railroads for the safe, secure, and reliable transportation of raw materials and products. Dow's business model is built on the fact that rail transportation of hazardous materials represents the safest, most efficient, most economical, and most socially acceptable way to transport large volumes of these materials long distances over land.

Safety is a crucial goal for Dow in all aspects of its business. Dow has been a leader in ensuring the safe handling and transport of TIH/PIH commodities such as chlorine. {

}[3] For example, Dow has been at the forefront of the science-based effort to create a next generation chlorine tank car. This effort has consisted

[3] Pursuant to the Protective Order in this proceeding, information contained within single brackets {...} has been designated "CONFIDENTIAL," and information contained within double brackets {{...}} has been designated "HIGHLY CONFIDENTIAL."

of extensive empirical evidence regarding how tank cars impact, how releases occur, and what design elements create the safest tank car possible.

Dow has also participated actively in the Advanced Tank Car Cooperative Research Program and the implementation of advanced GPS and sensor tracking technologies on chlorine tank cars. In conjunction with its goals, Dow continues to work on redesigning its supply chain to reduce rail shipments of chlorine. Dow strongly supports community emergency preparedness and response through TRANSCAER®, an acronym for Transportation Community Awareness and Emergency Response, a voluntary national outreach effort that trains more than 20,000 people annually to prepare for and respond to emergencies in the unlikely event of a chemical transportation incident in their local communities. Dow supports continuous improvement in reducing the potential risks associated with shipping TIH/PIH by rail, but Dow does not agree with changes to existing safe operating practices if such changes have not been tested and shown to increase safety.

B. Interest of Dow in this proceeding.

Dow receives rail service from the Huron and Eastern Railway ("HESR"), a RailAmerica subsidiary, for shipments of chlorine and anhydrous hydrogen chloride ("AHCl") from interchange with CN at Durand, Michigan to a Dow facility in Midland, Michigan. HESR has attempted to implement the PTS proposal on Dow's chlorine and AHCl shipments. Significant discussions have occurred between Dow and HESR/RailAmerica regarding the proposed application of the PTS requirements on these shipments. More recently, another RailAmerica subsidiary, the Indiana & Ohio Railway ("IORY"), also has imposed the PTS proposal upon inbound shipments to a Dow facility in Cincinnati.

III. Governing Law.

A. Unreasonable Practice.

As described further below, evaluation of the PTS proposal under the circumstances at issue in this case reveals that it is an unreasonable practice. A comprehensive regulatory regime already governs the safety of hazardous materials rail transportation, and is managed by the Federal Railroad Administration ("FRA"), the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), and the Transportation Security Administration ("TSA"). There is no evidence that the PTS proposal increases safety beyond that already provided by the existing comprehensive regulatory regime.

Where such a comprehensive safety regime already exists and is administered by other federal agencies, precedent requires that a railroad proposing additional safety measures specifically show that the existing regime is insufficient. Consolidated Rail Corporation v. Interstate Commerce Commission, 646 F.2d 642, 648-652 (D.C. Cir. 1981) ("Conrail"). Defendants have not even begun to attempt to meet this standard. Therefore, the PTS proposal is an unreasonable practice.

B. Common Carrier Obligation Violation.

Railroads have a common carrier obligation under 49 U.S.C. § 11101 to serve shippers on their rail lines. Pejepscot Industrial Park, Inc. d/b/a Grimmel Industries – Petition for Declaratory Order, STB Docket No. 33989, slip op. at 14 (STB served May 15, 2003). (finding that, where there is no embargo or abandonment, railroad "had an absolute duty to provide rates and service...upon reasonable request, and that its failure to perform that duty was a violation of section 11101"; see also Tanner & Co. et al. v. Chicago, Burlington & Quincy R.R. Co., 53 I.C.C. 401, 406 (1919); Pacolet Mfg. Operating Allowance, 210 I.C.C. 475, 477 (1935).

The common carrier obligation is perhaps the most basic and foundational tenet of federal rail transportation law. See Common Carrier Obligation of Railroads, Transcript of Public Hearing at 33-34, STB Ex Parte No. 677 (April 24, 2008) (statement of Chairman Nottingham) (Noting that the common carrier obligation goes back to Roman law and stating that "the heart of the Board's mission is our responsibility to serve as a forum for resolving disputes...regarding whether...the railroads are carrying out that obligation to provide service on reasonable request.") (internal quotes omitted).

The Board has the authority to determine that tariff or contract provisions unlawfully interfere with the common carrier obligation. Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH and Darlington, PA, in Mahoning and Columbiana Counties, OH and Beaver County, PA, STB Docket No. AB-556 (Sub-No. 2X), slip op. at 3 (served Jan. 7, 2000) ("contractual restrictions that unreasonably interfere with common carrier operations are deemed void as contrary to public policy"). The Board can also determine that preconditions are unlawful if they must be met by a shipper to obtain rail service. Pejepscot Industrial Park – Petition for Declaratory Order, STB Docket No. 33989, slip op at p. 13 (served May 15, 2003) (stating that a "rail carrier cannot make its service contingent upon guaranteed profits from that service or upon the shipper's advance funding of repairs to the rail line over which the service would then be provided"); Parrish & Heimbecker, Inc. – Petition for Declaratory Order, STB Docket No. 42031 (served May 26, 2000) (finding tariff surcharge to be an unreasonable practice). See also United States v. Baltimore & Ohio R.R. Co., 333 U.S. 169, 177 (1948).

As described further below, the PTS proposal unlawfully interferes with the common carrier obligation because it establishes numerous unreasonable preconditions and restrictions on rail service for certain shippers.

C. The Board should apply the Conrail standard to this proceeding.

1. Unlike the two cases cited by Defendants, the facts surrounding the PTS proposal are similar to Conrail.

Defendants assert that reliance on Conrail is "not supported by the facts." Response to Complainants' Supplemental Information at p. 17 (filed Oct. 31, 2011) ("Response"). Defendants then describe certain differences between the Conrail case and the issue now before the Board in this proceeding, but Defendants have completely ignored numerous other facts that show the similarity between Conrail and this proceeding. The Board can and should look to Conrail to find that (1) Defendants have the burden of proof regarding the reasonableness of the challenged PTS proposal; and (2) a cost-benefit analysis should be used in evaluation of the PTS proposal.

The particular issue before the ICC[4] and the Court of Appeals in the appeal by Conrail of that decision is no different than the issue before the Board today. Specifically, the issue before the ICC was "whether the railroads' voluntary attempt to institute and charge for additional safety measures not mandated by DOT or NRC is 'reasonable' under the Interstate Commerce Act." Conrail, 646 F.2d at 650 (n. 16). Similarly, the issue before the Board today is whether Defendants' PTS proposal creating additional safety measures for hazardous materials transportation, at significant cost, is "reasonable" under ICCTA given the comprehensive safety regulation in this field by the Department of Transportation ("DOT"), FRA, TSA, and PHMSA.

[4] Trainload Rates on Radioactive Materials, Eastern Railroads, 362 ICC 756 (1980).

Cases cited by Defendants do not prove otherwise. Unlike both Conrail and the facts surrounding the PTS proposal, neither North American Freight Car[5] nor AECC[6] dealt with safety measures applied to transportation of hazardous commodities where other federal agencies had been directed by Congress to ensure safe transportation and, consequently, had already established a comprehensive regulatory regime of safety measures. The two cases cited by Defendants dealt with new tariffs (1) assessing demurrage and storage charges for empty private rail cars (NAFCA), and (2) creating performance standards applicable to dust emissions from loaded coal trains (AECC). Neither case dealt with safety and, crucially, there is no comprehensive federal regulatory regime covering either demurrage/storage charges or coal dust emissions from trains.

2. The burden of proof should be on Defendants.

It is true that the burden of proof is customarily on the complainant in unreasonable practice cases. NAFCA, slip op. at 5. However, the specific circumstances of this case are akin to those in Conrail and, therefore, the burden of proof should be on Defendants just as it was on the railroads in Conrail.

In NAFCA, the Board described several distinctive facts that showed Conrail was "not analogous" to the BNSF storage and demurrage charges at issue in NAFCA. While Defendants claim that the current dispute over the challenged PTS proposal is similarly not analogous to Conrail (Response at 17), even a cursory evaluation of NAFCA shows that two of the Conrail facts mentioned by the Board are also present in the Board evaluation of the PTS proposal. First, "the extra services for which the railroad was attempting to charge extra, which were purportedly

[5] North American Freight Car Association v. BNSF Railway Company, STB Docket No. 42060 (Sub-No. 1) (served Jan. 26, 2007) ("NAFCA").
[6] Arkansas Electric Cooperative Corporation – Petition for Declaratory Order, STB Docket No. 35305 (served March 3, 2011) ("AECC").

required for safety reasons, were not required by the Department of Transportation (DOT) and the Nuclear Regulatory Commission (NRC), which had primary jurisdiction over safety." NAFCA, slip op. at 5. This is identical to the PTS proposal, which is ostensibly for safety reasons despite not being required by either the FRA or PHMSA, which have primary safety jurisdiction. Second, "DOT and NRC had determined that the transportation was safe without the additional special services applied by the railroads." NAFCA, slip op. at 5. Again, FRA and PHMSA have specified certain requirements for safe transportation of hazardous materials, and the PTS provisions are not among them.

Defendants claim that the Staggers Act "shifted the burden of proof to the shipper", but this is an overstatement. As the court noted in Conrail, it was not the statute that controlled the determination of the burden of proof but, instead, the specific facts at issue: "the burden is on them to show that, for some reason, the presumptively valid DOT/NRC regulations are unsatisfactory or inadequate in their particular circumstance." Conrail, 646 F.2d at 650.[7] It is exactly this showing that the Board should require of Defendants – that the presumptively valid FRA/PHMSA regulations are unsatisfactory or inadequate given the particular circumstances of Defendants' operations.

Congress has not specifically defined what constitutes an unreasonable practice. WTL Rail Corporation – Petition for Declaratory Order and Interim Relief, STB Docket No. 42092, slip op. at 6 (served Feb. 17, 2006). Consequently, the Board has broad discretion regarding determination of unreasonableness, and the Board applies that discretion in a "fact-specific" inquiry on a case-by-case basis. WTL, slip op. at 6. See also Granite State Concrete Co., Inc. v. Surface Transportation Board, 417 F.3d 85, 92 (1st Cir. 2005) (the Board "has been given broad

[7] Indeed, later court decisions show that the Conrail precedent was considered, but not applied, simply due to the particular facts at issue and not because of the Staggers Act. North American Freight Car Association v. Surface Transportation Board, 529 F.3d 1166, 1174 (n. 7) (D.C. Cir. 2008).

discretion to conduct case-by-case fact-specific inquiries to give meaning to these terms, which are not self-defining, in the wide variety of factual circumstances encountered"). Defendants request that the Board follow the burden of proof determination from NAFCA (where the Board decided that complainants had the burden) based on the "facts and circumstances" of this case (Response at 18), but Defendants' request is only feebly supported. As described above, the current situation, unlike NAFCA and AECC, is quite similar to the factual scenario in Conrail.

In sum, then, the Board's statement in NAFCA applies with equal force to the PTS proposal: "the court placed the burden on the railroads to prove that the presumptively valid regulations were unsatisfactory or in adequate in their particular circumstances." NAFCA, slip op. at 5. The same considerations apply here, and the Board should find that Defendants have the burden of proof.

3. The Board should determine whether the PTS Proposal is reasonably commensurate economically with the problem it purports to address.

Evaluation of the reasonableness of the PTS proposal should not occur without consideration of the costs required for PTS. As the Board recently stated, "any tariff provision must be reasonably commensurate economically with the problem it addresses." AECC, slip op. at 6. Although the Board has determined that a formal cost-benefit analysis ("CBA") is not always warranted (AECC, slip op. at 6), the specific facts at issue here regarding the PTS proposal indicate that a CBA is appropriate. Unlike the situation in AECC, the history of TIH/PIH tank car safety includes decades of extensive scientific and data-focused analyses. Most of this analysis has not only included quantification of costs and benefits, but is available publicly because the analyses occurred in the public arena via rulemaking proceedings of PHMSA, FRA, and other agencies. In short, it is entirely appropriate to compare the costs and benefits of the PTS proposal. The Board should evaluate whether the PTS proposal produces

safety benefits which are "commensurate" with their cost. Conrail, 646 F.2d at 648. The Board should also determine whether the PTS proposal represents an "economical means of achieving the expected safety benefit" when compared with other possible safety measures. Conrail, 646 F.2d at 648.

IV. Argument.

As shown below, the PTS proposal is an unreasonable practice in violation of 49 USC § 10702 and it causes Defendants to violate their common carrier obligation under 49 USC § 11101. The PTS proposal unreasonably purports to mandate certain rules in an area already extensively covered by federal regulations. It does so without any supporting analysis or evidence regarding the safety impact of the challenged provisions, let alone the relationship of the claimed benefits to the costs involved. All relevant facts reveal that the PTS proposal is an unreasonable practice that unlawfully impedes provision of common carrier rail service.

In addition to the Opening Evidence provided herein, Dow also supports the evidence filed by the American Chemistry Council ("ACC") and The Chlorine Institute ("TCI"). Dow is a member of both ACC and TCI.

A. The PTS proposal is an unreasonable practice.

1. A comprehensive federal regulatory safety regime for hazardous materials rail transportation already exists.

a. The Department of Transportation manages a comprehensive system of TIH/PIH transportation regulation.

Congress has directed DOT to establish and oversee a comprehensive system for promoting and ensuring railroad safety, particularly with regard to the transportation of TIH/PIH commodities. Railroad safety is governed by 49 USC § 20101 *et seq.*, which addresses a wide variety of railroad equipment and operations issues. The purpose of these statutes "is to promote

safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 USC § 20101. See also 74 FR 1772 ("[t]he Secretary...has authority over all areas of railroad transportation safety"). Similarly, hazardous materials transportation is governed by 49 USC § 5101 *et seq.* As directed by Congress, the Secretary of Transportation "shall prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce." 49 USC § 5103(b)(1). The Secretary of Transportation has delegated its authority in these areas to the Federal Railroad Administration, 49 CFR § 1.49, and the Pipeline and Hazardous Materials Safety Administration, 49 CFR § 1.53.

As the Board knows, the regulations established by FRA, PHMSA, and TSA are extensive. See, e.g., CSX Transportation, Inc. – Petition for Declaratory Order, STB Docket No. 34662, slip op. at 3 (served March 14, 2005). "FRA promulgates and enforces a comprehensive regulatory program" at 49 CFR Parts 200-244, covering virtually all aspects of the rail industry, including areas such as: track, communications, rolling stock, end-of-train marking, safety glazing, incident reporting, locational requirements for the dispatch of U.S. rail operations, safety integration plans, operating practices, alcohol and drug testing, locomotive engineer certification, and workplace safety. 74 FR 1772.

The regulatory scheme established by PHMSA is no less impressive. See 49 CFR Parts 171-180. PHMSA regulations have categorized hazardous materials into various classes based on risk, and each class must be packaged, handled, marked, labeled, and placarded according to the regulations. 74 FR 1771-1772. Additionally, PHMSA regulations cover communications, emergency response information, training requirements, and "operational requirements applicable to each mode of transportation." 74 FR 1772. PHSMA regulations also cover handling of rail cars and the positions of cars in trains. 49 CFR § 174.82 *et seq.*

PHMSA recently issued new regulations regarding rail routing of hazardous materials shipments in order to increase safety. 49 CFR § 172.820. See also 73 FR 20752; 73 FR 72182. Notably, the final rule included provisions which "clarif[ied] rail carriers' responsibility to address in their security plans issues related to en route storage and delays in transit." 73 FR 72182.

Finally, TSA[8] administers regulations imposing chain of custody requirements and other security-related mandates on parties involved in rail transportation of hazardous materials. 49 CFR § 1580.100 *et seq.* See also 73 FR 72130.

b. PHMSA recently revised PIH tank car standards and operating practices.

On April 1, 2008, PHMSA issued a Notice of Proposed Rulemaking ("NPRM"), proposing "enhanced tank car performance standards and operating limitations designed to minimize the loss of lading from tank cars transporting PIH materials in the event of an accident." 73 FR 17820. This NPRM was the culmination of multi-year "comprehensive review of design and operational factors that affect rail tank car safety" undertaken jointly by PHMSA and FRA. 73 FR 17819. Several public meetings were held, comments were sought, and research was conducted. It was only "after careful review and consideration of all of the relevant research and data, oral comments at the public meetings, and comments submitted to the docket" that PHMSA issued the NPRM. 73 FR 17820.

DOT believed that its two-pronged approach – focusing on both operating conditions and puncture-resistance – "represent[ed] the most efficient and cost-effective method of improving the accident survivability of these cars." 73 FR 17820. This concern about cost-effectiveness reflected the Regulatory Impact Analysis ("RIA") prepared by PHMSA. In the RIA, PHMSA

[8] Unlike FRA and PHMSA, TSA is in the Department of Homeland Security.

calculated the expected costs and benefits of the proposal over a 30-year time period, pursuant to several different scenarios. 73 FR 17850-17852. To assist in the development of the proposal, FRA analyzed data from 40 years of chlorine incidents. Among other things, FRA found that "no catastrophic losses of chlorine occurred at speeds below 30 mph." 73 FR 17821.

The final rule promulgated by PHMSA deviated somewhat from the NPRM. 74 FR 1770. After evaluating comments filed in response to the NPRM, PHMSA determined that interim tank car standards were necessary. Thus, the final rule included specific commodity-specific design standards for tank cars constructed after March 16, 2009, but these standards were less ambitious than those originally proposed in the NPRM. 74 FR 1783. Similarly, the final rule did not include the 30 mph speed limit for unsignaled ("dark") territory, but the rule did include an overall 50 mph speed limit for all loaded PIH tank cars. 74 FR 1781. The 50 mph speed limit is notable because PHMSA found that the car-to-car impact speed is "approximately one-half of the initial train speed." 73 FR 17821. Consequently, a maximum speed of 50 mph would result in car-to-car impact speeds of only 25 mph.

c. Defendants have not shown that the existing regulations need to be supplemented, or that the ample rulemaking processes were an insufficient forum to address Defendants' concerns.

Defendants are not writing on a clean slate with the PTS proposal. There are voluminous pre-existing safety requirements in this area which resulted from decades of study, analysis, and public comment. The Board should not ignore this "broader reality" of TIH/PIH transportation. Parrish & Heimbecker, Inc. – Petition for Declaratory Order, STB Docket No. 42031, slip op. at 3 (served May 25, 2001) (railroad practice found unreasonable where it ignored the "broader reality" of how transportation plays a role in business decision-making). Cf. Radioactive

Materials, Special Train Service, Nationwide, 359 ICC 70, 74-75 (1978) (special trains not found to be safer).

Defendants have not shown any particular, localized issues applicable to the shortline railroads at issue in these consolidated proceedings that would require measures in addition to those established by PHMSA, FRA, and TSA in their comprehensive regulatory framework. 49 CFR § 174.20(a). See also Conrail, 646 F.2d at 650 ("The railroads may indeed seek to prove the reasonableness of additional safety measures, but the burden is upon them to show that, for some reason, the presumptively valid DOT/NRC regulations are unsatisfactory or inadequate in their particular circumstance.").

Similarly, Defendants have not shown that the PHMSA, FRA, and TSA rulemaking processes were and are an insufficient forum to address any concerns that Defendants may have. Conrail 646 F.2d at 652 ("the railroads have had, and will continue to have, ample opportunity to petition both the NRC and DOT for review of their respective regulations in this area").

2. Defendants have not provided any evidence that the elements of the PTS proposal actually increase safety.

The PTS proposal is an unreasonable practice, and causes a violation of the common carrier obligation, because Defendants have not shown that the PTS proposal results in any safety benefits. Where a comprehensive federal safety regime administered by other agencies already exists, the burden is on the railroad proposing new requirements to show that the "presumptively valid" regulations "are unsatisfactory or inadequate" in the railroad's particular circumstances. Conrail, 646 F.2d at 650. This showing has not been made.

There has been no analysis showing that the PTS proposal results in any increase in safety compared to "normal" rail operations. In fact, there has been no analysis whatsoever. Defendants claim to have a safety objective, but there is no analysis showing that the objective is

met by the PTS proposal. Defendants engaged in only the most cursory decision-making process possible, simply relying on their own beliefs, wisdom, and experience in the railroad industry. RailAmerica spent considerable time and effort in determining how to price the new PTS proposal, but no time or effort in determining if PTS is safer, or whether the specific elements in the PTS proposal are actually safer than any of the innumerable other possible elements of a new TIH/PIH handling tariff.

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[10] Exhibits 3-5, 21, and 23 are transcript excerpts from a deposition with James Shefelbine, the Vice President of Marketing for RailAmerica. The cover pages of the transcript are included with Exhibit 3.

In essence, Defendants are asking that shippers simply trust Defendants' inherent wisdom, but this is exactly the sort of position that was rejected in Conrail. 646 F.2d at 647-648.

In fact, the PTS proposal actually runs contrary to the real-world evidence developed at the Florida East Coast Railway ("FEC"), a former sister company to RailAmerica. {{

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3. The PTS proposal decreases safety.

Given that Defendants have engaged in no analysis whatsoever, it is not surprising that PTS can result in less safe train operations compared to normal rail operations. {{

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}} In other words, compliance with the PTS proposal could result in violating federal safety regulations such as 49 CFR § 174.14(a) (cars must be moved within 48 hours) and 49 CFR § 174.14(b) (cars shall not be held for forwarding instructions). Furthermore, Defendant RailAmerica has previously recognized that reducing the operating efficiency of trains carrying hazardous materials can "hinder safe rail operations." Comments of RailAmerica, Inc., CSX Transportation, Inc. – Petition for Declaratory Order, STB Docket No. 34662 (filed Feb. 16, 2005).

PTS could also reduce the safety of AHCl shipments, which are time-sensitive. Shippers of AHCl must always be vigilant regarding the transit time of cars carrying AHCl due to the danger of over-pressurization in the rail car. The PTS provision that mandates no more than three TIH/PIH rail cars per train could lengthen transit times of AHCl cars by forcing shippers or railroads that interchange with Defendants to hold onto AHCl cars for a longer period of time. In other words, if a given train of Defendants already had three TIH/PIH cars in it, then additional cars would have to wait for a second or even third train so as not to violate the three-car limit. This over-pressurization danger occurs not only with loaded AHCl cars, but also cars that have any significant amount of AHCl – such as a "heel" car. When these AHCl cars are held at a

location with no capability to vent the car, then delays caused by PTS undoubtedly increase safety concerns.

4. Defendants refused Dow's offer to engage in a safety analysis.

Defendants' witness claimed that RailAmerica was "dismayed and disappointed by the shippers' unwillingness to engage in a conversation" and the lack of "shipper input" regarding TIH/PIH shipments. Verified Statement of James Shefelbine, p. 24 of Defendants' Response. While Dow cannot speak for the other parties involved in this proceeding, the "dismay" and "disappoint[ment]" expressed by Defendants certainly does not and cannot apply to Dow. As described below, Dow spent months discussing Defendants' desire to implement the PTS proposal. {

} Crucially, Dow offered to participate in an empirical study to determine if Defendants' proposal met the safety goals ascribed to it. Defendants refused this offer, however, and went forward with the PTS proposal without any empirical support, and without input from the FRA (the agency with primary responsibility for rail safety).

Dow's commitment to empirically-supported safety measures is exemplified by the significant dialogue between Dow and RailAmerica during 2010 and 2011. Dow first learned of RailAmerica's plan to implement new operating rules for TIH/PIH shipments in July 2010. Communication with RailAmerica occurred in July 2010 and November 2010, but Dow obtained only limited information regarding the RailAmerica plan. {

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} The parties therefore reached an impasse.

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}} Moreover, Defendants' establishment of the PTS proposal completely ignores the decades of intense study and analysis by numerous federal agencies, such as the FRA and PHMSA, studies and analysis that were subject to grueling public comment, unlike the closed-door development of the Defendants' PTS proposal by the seven-member Team. Defendants claim that the complainants do not recognize the "eminently logical" proposition that slower speeds are safer (Response at 14), yet {{

}} Still, there is no support for operating PTS trains at all, much less at speeds below which most RailAmerica subsidiaries operate their regular train service.

5. The PTS proposal is an unreasonable practice due to the burdensome requirements placed on shippers.

The mandate that PTS trains can contain no more than three cars of TIH/PIH commodities is completely at odds with the nature of the rail business. Shippers such as Dow cannot control the irregular and random nature of either customer purchases or transportation timing. Where the shipper originates the shipment with a RailAmerica subsidiary, requiring the shipper to tender no more than three cars at a time might result in holding loaded TIH/PIH rail cars at the shipper's facility. Where the shipper receives inbound shipments from a RailAmerica railroad, the shipper cannot control the variation in transportation time that may result in bunching (delivery of many cars at one time).

In response to these concerns, Defendants have, incredibly, asserted that "Complainants do control...the routing of the [Class I] trains." Response at 12 (n. 5). Nothing could be further from the truth. "The routing protections provided to rail carriers by section 10705 are longstanding and...confer on each railroad the initial discretion to choose the routes it will use to respond to requests for service." Central Power & Light Company v. Southern Pacific Transportation Company, 2 STB 235, 241 (1997). Moreover, TSA routing protocols further define and limit the routes that railroads use. 73 FR 20752 (April 16, 2008).

In the same footnote, Defendants have claimed that Complainants can control the timing of rail car hand-offs by Class I railroads to AGR simply by adjusting the time at which Complainants tender their shipments to the Class I railroads. This claim ignores those situations where Complainants are the consignees only, and not the consignors.[12] Moreover, regardless of the time that Complainants may tender cars to the Class I railroads, bunching of rail cars still

[12] Even where Complainants are consignors, limiting the number of TIH/PIH shipments that can be tendered to Defendants might cause delays and result in safety concerns due to issues such as the over-pressurization risk in AHCl cars. See Section IV.A.3.

occurs. See, e.g. Ex. 9 (e-mail from Harry Shugart). Complainants do not control the operations of Class I railroads, nor do Complainants control the weather, maintenance needs and scheduling, and any of the innumerable other factors that affect rail operations and the time that rail cars reach AGR.

6. PTS has become a profit center for Defendants.

The national transportation policy seeks to promote efficiency and sound management of railroads. 49 USC § 10101(3), (4), (5), and (9). Although Complainants are not challenging the specific rate level charged by Defendants for any particular movement, rate-related issues can be instructive in determining the reasonableness of a railroad practice. See, e.g., Rail Fuel Surcharges, STB Ex Parte No. 661, slip op. at 7 (served Jan. 26, 2007). {

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As shown above, the PTS surcharge does much more than merely recover Defendants' costs of providing PTS. Given the profit enhancing impact of PTS, the "surcharge" is misleading and an unreasonable practice. Rail Fuel Surcharges, slip op. at 7 ("We believe that imposing rate increases in this manner, when there is no real correlation between the rate

increase and the increase in fuel costs for that particular movement to which the surcharge is applied, is a misleading and ultimately unreasonable practice.").

Indeed, many elements in the PTS proposal are already followed by RailAmerica subsidiaries. For example, AGR and certain other RailAmerica subsidiaries are limited to 10 mph due to the applicable FRA track class involved. Ex. 23. The PTS proposal mandates that TIH/PIH rail cars must be inspected upon interchange from another carrier, which is already an FRA requirement. 49 CFR § 174.9(a). This begs the question of what, exactly, the PTS charges are intended to cover. Cf. Atchison Railway Company v. United States, 232 U.S. 199, 217 (1914) ("Neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay.").

B. The PTS proposal causes Defendants to violate the common carrier obligation.

Under 49 USC § 11101(a), common carrier railroads must provide rail service on "reasonable request." As described above in Section IV.A, the PTS proposal places unreasonable limitations on rail transportation of TIH/PIH commodities and, therefore, the PTS proposal causes defendants to violate the common carrier obligation.

Rail is the most effective and lowest risk mode of land transport for large volumes of hazardous materials over long distances. Therefore, the common carrier obligation is integral to the safe transportation of hazardous materials. Without the common carrier obligation, many in the rail industry have made it absolutely clear that they would not haul TIH/PIH materials at all, and might also refuse to haul other categories of hazardous material. The consequences would compromise public safety and the overall public welfare because these hazardous materials either would move by a less safe mode or not at all. Akron, Canton & Youngstown Railroad Company v. Interstate Commerce Commission, 611 F.2d 1162, 1168 (6th Cir. 1979).

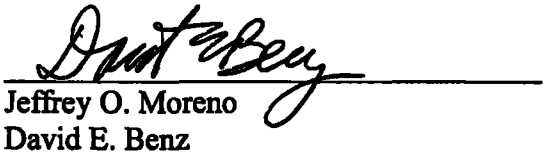
Defendants claim that the PTS proposal "provide[s] requirements for the safe movement of TIH/PIH over the [Defendants'] Railroads." See Reply filed by Defendants (June 6, 2011). In the related proceeding, Defendants stated that the PTS proposal "reduc[es] the danger" in handling "extremely dangerous" commodities. See Answer filed by Defendants in STB Docket No. 42129 (May 5, 2011). These statements are contrary to existing precedent regarding the common carrier obligation. Akron, 611 F.2d at 1169 ("a carrier may not ask the Commission to take cognizance of a claim that a commodity is absolutely too dangerous to transport, if there are DOT and NRC regulations governing such transport, and these regulations have been met"). Defendants have not shown that the additional requirements in the PTS proposal are warranted under the circumstances at issue. 49 CFR § 174.20(a). See also Conrail, 646 F.2d at 650; Akron, 611 F.2d at 1169. Therefore, the PTS proposal causes a violation of the common carrier obligation.

As described above, a comprehensive federal regulatory safety regime for rail transportation of hazardous materials already exists. The PTS proposal places unnecessary further preconditions on shippers in order to obtain rail service. The Board can and should find that these preconditions unlawfully restrict the common carrier rail service. Pejepscot, slip op at p. 13. A rail line owner may not "enforce conditions upon its use which conflict with the power of Congress to regulate railroads so as to secure equality of treatment of those whom the railroads serve." United States v. Baltimore & Ohio R.R. Co., 333 U.S. 169, 177 (1948). The PTS proposal should be found an unlawful limitation on the common carrier obligation.

V. Conclusion.

For all the reasons stated above, Defendants' PTS proposal is an unreasonable practice in violation of 49 USC § 10702 and causes Defendants to violate their common carrier obligation under 49 USC § 11101. Injunctive relief is appropriate under 49 USC § 721(b)(4).

Respectfully Submitted



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January 13, 2012

Certificate of Service

I hereby certify that on this 13th day of January 2012, a copy of the foregoing Opening Evidence of Dow Chemical Company was served by electronic delivery and first-class mail, postage prepaid, on counsel for Defendants at:

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The foregoing was also served via first-class mail, postage prepaid, on all other members of the service list.

David E. Benz

Exhibits

All Exhibits are redacted.